No. 2695

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN MACAULAY,
Plaintiff in Error,

vs.

ALASKA GASTINEAU MINING CO.
(a corporation),
Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Alaska, Division Number 1.

BRIEF FOR DEFENDANT IN ERROR.

SHACKLEFORD & BAYLESS,
Z. R. CHENEY,
Attorneys for Defendant in Error.

RUFUS THAYER,
Of Counsel.

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Statement of the Case.

Defendant in error is the owner and operator of the Perseverance mine near Juneau, Alaska. At the time the accident complained of occurred, defendant was driving an upraise along the foot wall of the vein from the tenth level of said mine towards the ninth level, at right angles to the level, but at an incline of approximately 65 degrees to the horizontal plane of the levels. This raise had

then been driven approximately 90 feet from the tenth towards the ninth level. At about 50 feet up the raise there existed a short drift 30 feet long, referred to in the record as the intermediate drift, connecting the raise with an old stope, and continuing a short distance beyond the raise on the side opposite the stope. It had nothing to do with the prosecution of the raise, but was driven for ventilating that part of the mine, and being convenient was sometimes, though not always, used as a station by the miners prosecuting the raise. Between the intermediate drift and the tenth level the raise was divided into two compartments, a manway and an ore chute, a bulkhead in the floor of the intermediate drift covering the manway compartment. The raise at that time extended approximately 40 feet up beyond the intermediate drift, and was being driven by a day and a night shift. It was the custom for a shift to blast its round of shots in the top of the raise just before it ceased work, and for the oncoming shift to first bar down and clear the raise of the rock shattered by the last previous blast. The raise was thus made safe so that the miners could then put in a temporary staging near the top upon which they set up their machine drills to drill holes for the next round of shots. In order to climb up the raise and bar down and clear it of shattered rock, and put in the temporary staging, ladders were maintained up the foot wall side of the raise,

and it was naturally necessary as the work progressed from time to time to extend these ladders.

On the evening of March 13, 1914, plaintiff, while in the employ of defendant as an underground laborer, or mucker, on the night shift, with another mucker, was directed by the shift boss to accompany him from the tenth level west to the tenth level east, to go on new work. As the three men were passing the foot of the raise, they encountered the two miners, or machine men, who were driving the raise on that shift. These miners told the shift boss they had barred down as far as the ladders extended up to within about 10 feet of the top or roof, and had come down for additional ladders to put up so that they could finish clearing the raise. The shift boss replied that he did not have much for the plaintiff and the other mucker to do, and told the miners to take them to assist in getting up the ladders. The two miners, the plaintiff and the other mucker then went up to the intermediate drift and consumed about an hour or hour and a half in shovelling the loose rock which had fallen down from the previous blasts off of the bulkhead into the ore chute, removing the bulkhead preparatory to hoisting the ladders up through the manway. While they were so engaged, from time to time loose rock and fine dirt dropped down the raise to where the men were working. After the bulkhead was removed two of the men went down the manway

to attach a cable to the ladders, by which the plaintiff and the other man, a machine man, remaining in the intermediate drift were to hoist the ladders up through the manway with a hand windlass or winch stationed in the intermediate drift midway between the raise and the stope. While the plaintiff and miner were waiting for a signal to hoist from the men below, a piece of rock a little larger than a man's fist came bouncing down the raise from side to side, glanced off, and struck the plaintiff a little above the ankle and broke his leg. Plaintiff at the time was standing within the intermediate drift and under its roof. The evidence is undisputed that the duties of a mucker include general labor, hoisting lagging, hoisting timber, hoisting ladders, putting in timbers, and generally helping and assisting underground miners in any manner they may be directed. The evidence therefore shows that the plaintiff at the time he was injured was engaged in assisting the miners to make safe the place where the work was being prosecuted, and that the place was continually changing its character for safety as the work progressed.

At the conclusion of the testimony the Court granted defendant's motion for an instructed verdict made upon the following grounds: First, that the evidence in the case failed to show that the defendant was negligent. Second, that the evidence showed that the plaintiff assumed the risk.

Third, that any claim for damages had been fully adjusted and compromised by settlement made between the plaintiff and defendant.

Points and Authorities.

I.

DEFENDANT WAS NOT NEGLIGENT IN SUPPLYING A SAFE PLACE FOR PLAINTIFF TO WORK.

The duty of a master to supply a safe place to work does not exist (a) when the servant is engaged in a work that in itself constantly changes the place as to its character for safety. (b) When the servant is employed in making the place safe.

City of Minneapolis v. Lundin, 58 Federal 525;

Finlayson v. Utica Mining and Milling Company, 67 Federal 507;

Moon-Anchor Consolidated Gold Mines, Ltd., v. Hopkins, 111 Federal 298;

Armour v. Hahn, 111 U. S. 313;

Railway Company v. Jackson, 65 Federal 48;

Allen v. Bear Creek Coal Company, 43 Montana 269; 115 Pacific 673;

Thurman v. Pittsburg and Montana Copper Company, 41 Montana 141; 108 Pacific 588;

Bird v. Utica Gold Mining Company, 2 Cal. Appeals 674; 84 Pacific 256;

Williams Coal Company v. Cooper, 138 Kentucky 287.

II.

THE PLAINTIFF ASSUMED THE RISK BECAUSE IF ANY DANGER EXISTED IT WAS TEMPORARY AND AROSE FROM THE PROGRESS OF THE WORK.

Davis v. Trade Dollar Consolidated Mining Company, 117 Federal 122;

Ianne v. U. S. Gypsum Company, 110 N. Y. S. 496.

III.

ALTHOUGH PLAINTIFF EXECUTED A RELEASE TO DEFENDANT FOR ANY CLAIM FOR PERSONAL INJURY HE FAILED TO PLEAD OR PROVE THAT HE RETURNED, OR OFFERED TO RETURN THE MONEY RECEIVED AS THE CONSIDERATION FOR ITS EXECUTION.

Hill v. Northern Pacific Railway Company, 113 Federal 915.

Argument.

Plaintiff's case, as presented by his brief, rests upon the theory that if the rock which caused the injury fell from the upper part of the raise which had not been barred down, the defendant was negligent for failure to provide a safe place within which the plaintiff was to work. Defendant maintains that the doctrine of safe place does not apply to the circumstances and conditions disclosed in this case. The plaintiff's argument is based upon a statement of facts which erroneously implies, if it

does not actually represent, that he was put by defendant upon ordinary work in an unsafe place, but ignores the character of the work in which he was engaged, while the evidence clearly shows that he was engaged in assisting to make safe a place in the mine which was constantly changing as the work of driving the raise advanced. As the blast was exploded in the face of the raise the rock was broken or shattered for a distance of from five to seven feet, or more, depending upon its character, and the bulk of it fell down the raise. The remaining rock which became loose from the blast but did not fall, was then barred down and cleared off the face, walls and sides, so that it would not fall on the machine men while they were putting in the temporary staging, setting up their drills and drilling the holes for the next round of shots. The ladders were necessary to enable the miners to climb up the raise to put in the staging upon which they set up their drills and upon which they stood while drilling. The ladders were essential just as were the punches which were used in barring down, and it was while the plaintiff was assisting in procuring the ladders he was injured. The raise had been cleared up as far as the men could reach from the ladders which were then there, but they did not extend quite to the top of the raise, and an additional ladder was necessary to complete the cleaning. If the work of barring down had been completed the ladders would not have been necessary and plaintiff

would not have been engaged in helping to secure them.

All work in a mine is to some extent hazardous, pieces of rock may fall from the sides and roof of workings in spite of any precautions. Even old workings presumed to be entirely safe from the possibility of falling rocks cannot be guaranteed against the fall of isolated pieces, and the employer is required and expected to guard his employees in a mine only against probable accident or accidents which might be foreseen. He is not required nor expected to provide a place safe beyond the possibility of accident nor to guarantee his employees against any possible injury. He is required to exercise only reasonable diligence in this respect.

Plaintiff's brief on page 11 states that the barring down and making safe the raise

> "was the duty of the machine men who were supposed to be skilled in that sort of work, and are the only ones whose duties require them to assume that risk prior to the time the upraise is made reasonably safe by having this loose rock barred down".

We submit there is no evidence whatever to sustain this contention. It is likely that the dimensions of the raise would prevent more than two men standing on the ladders to do that particular work; but there is nothing to show, and it is not reasonable to believe that the machine men were the only employees who could bring ladders, or set them up in the raise. In this particular instance

ladders could not be run up through the chute compartment of the raise. The condition of the bottom of the raise at the tenth level made it impossible. Several men in addition to the machine men might have been required to get the ladders up. Who then were to be used to help if not the muckers? the very men who by the scope of their employment were to do this very thing. The evidence in uncontradicted that

> "a common laborer, a mucker, is always supposed to do general work, help timber, lay track, dig ditches, any kind of work except machines, not supposed to run machines; but any assistance he can give machine men in putting up his machines, putting on the power, laying track, that is a part of his work. They help the machine men to put up ladders". (Bill of Exceptions, page 74.)
>
> "A common laborer underground in a mine is supposed to help on most anything around the mine, to help machine men at most anything they want to do if they need help; to aid and assist in raising ladders in raises to be used in barring down rock from the face of the raise." (Bill of Exceptions, pages 83-84.)
>
> "A mucker is supposed to do everything outside of handling powder, to assist men in raising ladders." (Bill of Exceptions, page 87.)
>
> "A common laborer is supposed to do all of the work that a special laborer does not do. You can distinguish a common laborer from a special laborer. A special laborer is a miner who handles drills and powder, shaft man, hoist man, etc. The usual laborer around a mine has to perform all of the ordinary underground labor, commonly called a mucker. They are used to hoist lagging, hoist timbers, hoist ladders, to assist the miners who have the

> direct work of drilling, blasting their holes, put in timbers, sometimes laborers are called to assist the miners in that work." (Bill of Exceptions, page 88.)

From the portion of the brief above quoted to the effect that this work was only for the machine men, plaintiff could not logically maintain that if a machine man had been injured while engaged in barring down, the defendant would be responsible.

In the *Finlayson* case above cited, it appears that the deceased was at work in preparing a place to set a timber to make a level safe for the workmen, and was killed by the fall of a mass of rock uncovered by a blast a short time before. In that case it appeared that another miner and the foreman had noticed the mass of rock, that it was loose and might possibly fall, and they had tried to get it down, but that they did not apprehend immediate danger, and the deceased was put to work without any warning from the foreman, to cut a notch for a timber to make the place safe. The Court said:

> "The complaint in this case is that the master was negligent because it did not before Finlayson commenced to timber, safely timber and make safe the place necessarily made dangerous by the progress of the work which it had employed Finlayson himself and his fellow workmen to make safe. In other words, the complaint is that the master was negligent because it did not render unnecessary the work it employed the servant to do before he commenced to do it."

A directed verdict for the defendant was affirmed. So in the case at bar, the complaint is that the defendant was negligent because it did not bar down the rock before plaintiff was directed to assist in putting up ladders to enable the miners to bar down.

In the *Moon-Anchor* case above cited, deceased was killed by the fall of a large piece of rock from the roof of a station just outside the timbering under which he stood. This rock fell on a pile of rock formed by a cave-in outside of the timbering, and was deflected so as to glance under the timbering, and crushed the deceased, causing his death. The court held that the evidence disclosed no substantial fault or want of care on the part of the defendant, and that deceased was killed while engaged in make a place safe which was constantly changing as the work progressed.

In the case at bar the character of the raise for safety changed from hour to hour as the work progressed. As soon as the raise had been cleared of the rock shattered by the blast and completely barred down it might be considered a safe place even upon the contention of plaintiff's counsel, and as the clearing and barring down progressed the safety of the place would necessarily increase. At the time of the injury the plaintiff was standing back within the intermediate drift and under its roof, and was injured by a rock which glanced so as to strike him as it came down the raise. The conditions were similar as to those

which appear in the *Moon-Anchor* case. Under any circumstances defendant could not be expected to provide against a piece of rock being deflected so as to glance into a covered working of the mine.

In the case of *Davis v. Trade Dollar Consolidated Mining Company,* plaintiff in error was injured by drilling into an unexploded blast. This Court said:

> "A master is not required to furnish a servant a safe place in which to work where the danger is temporary and when it arises from a hazard in the progress of the work itself and which is known to the servant."

Plaintiff by his employment must be presumed to know the dangers he was risking as an underground laborer and he assumed whatever risks there were.

In the case of *Ianne v. U. S. Gypsum Company,* 126 App. Div. 244; 110 N. Y. S. 496, a common laborer in a mine who transported props to a prop setter to be used by the latter in the course of his work in propping up the roof of a mine was injured. The Court held that the laborer was engaged in assisting to make the place safe and could not recover. Reversal of this case by N. Y. Court of Appeals was entirely upon another ground.

From the foregoing decisions quoted and the decisions cited, and a multitude of others which might be cited, it is obvious that one of the machine men employed in driving the raise, could not have recovered if he had been injured under circumstances like those under which the plaintiff was

injured. In other words, if the witness Polleta, who was a machine man engaged in driving a raise, and who at the time of the accident was with the plaintiff standing close to him in the intermediate drift, and was being assisted by the plaintiff in hoisting the ladders, had been struck and injured by the piece of rock, instead of plaintiff, he assuredly could not recover against the defendant. It remains only to ascertain whether defendant is liable to plaintiff when it would not be liable to a machine man with whom plaintiff was working as mucker. No unusual hazard was apparent, the evidence shows all four men were taking the same risk, and it does not appear that any of them considered the work hazardous. While the four men were at work shovelling rock off the bulkhead, and were engaged in that work for from an hour to an hour and a half, it appears that loose rock and dirt were from time to time falling down the raise. The plaintiff himself states:

> "While we were working there mucking off the bulkhead, little fine dust and stuff, little rocks, were coming down all the time." (Bill of Exceptions, pages 49-50.)

This the plaintiff appears to have disregarded. But in any event the rock and falling dirt rattling down the raise was sufficient to put plaintiff on notice as to the character of the work in which he was engaged for at least an hour or an hour and a half prior to the injury.

Plaintiff had applied to defendant for work as an underground laborer, or mucker. Although his testimony on the stand indicates that he had little or no experience underground, it is not contended that this fact was known to defendant. On the contrary, it affirmatively appears that plaintiff represented to defendant's agent at the time of his employment that he had been employed at the Brittania and Granby Bay mines, this while he was applying for work underground. The indications are that if plaintiff had then had no underground experience he was misrepresenting the facts to the defendant, in the hope of securing employment. There is nothing to show that he disclosed his lack of experience, but he led the defendant to believe that he was experienced in the class of work for which he was applying. (Bill of Exceptions 51, 58.) Defendant was fully justified in believing and in assuming that plaintiff was an experienced mucker, that he knew the ordinary duties of an underground laborer, and of the hazards incident to that work. If plaintiff had been employed in work upon the surface, and had been sent underground to perform underground labor, or if it appeared that defendant had knowledge that plaintiff did not know what the duties of a mucker were, or if it appeared that plaintiff was sent by defendant to do work in a place where defendant had knowledge of an unusual hazard, and the plaintiff did not have such knowledge, the case might be different; but everything indicates that so far as defendant knew, plaintiff had fully as much

information of the risks he was running as did the defendant. Plaintiff not only voluntarily assumed the risk of underground work, but invited the defendant to put him upon work of the very character as that in which he was engaged at the time of the injury. It is not a question of whether or not the plaintiff was ever in a raise before or had ever worked underground, but only a question as to whether or not defendant knew that plaintiff had had no experience underground, or whether defendant had reason to believe that plaintiff was a novice in work of this character. There is no evidence whatever to show that defendant knew plaintiff had not had experience underground, and the uncontradicted evidence is that plaintiff led defendant to believe that he had had underground experience in the Brittania and Granby Bay mines.

The raise was on an incline and rock dropping from the top of the raise could not fall vertically for more than a few feet and the danger of injury under these circumstances was necessarily slight, especially when defendant was standing underneath the roof of the intermediate drift, and could only be injured by a rock from the raise if it were deflected. Such work is not considered hazardous (bill of exceptions, page 92.) If any hazard existed it was temporary and due solely to the progress of the work. The most that can be said of the injury is that it was an unfortunate accident incident to the plaintiff's employment, working within the

scope of his employment and which he risked by accepting work.

The bill of exceptions does not disclose the evidence with reference to the release; but defendant's amended answer distinctly states that defendant paid plaintiff

> "$114.00 in full satisfaction on account of said injury or injuries so sustained and referred to in plaintiff's complaint, and plaintiff did receive the said sum from the defendant, and in consideration therefor did execute and deliver to defendant his release, fully satisfying and discharging any and all claims which the plaintiff had, or might have against the defendant because of said injury or injuries."

In plaintiff's reply to amended answer he admits that he received the sum of $112.50 and denies that it was in consideration of a release for claims for damages, but states that he signed a slip of paper upon fraudulent representations and while under great physical pain and unable to exercise sufficient care and circumspection to protect himself from imposition. But plaintiff nowhere avers a return of the money received, nor any offer to return the money, and the absence of evidence from plaintiff's own bill of exceptions must be considered more strongly against him, and under the authority laid down by this Court in the case of

Hill v. N. P. R. C., 113 Federal, 916,

defendant contends that plaintiff has no standing in Court.

The cases cited by plaintiff are not in point. In

Cunningham v. U. P. R. C., 7 Pacific 795,

the plaintiff was not injured while assisting to make the place safe.

Railway Company v. Jones, 182 Federal 769, and

Louisville and N. R. Company v. Bell, 26 Federal 395,

are concerned only with the inference which may be drawn by the jury as to proximate cause. In the case at bar there can be no dispute as to the proximate cause of the accident. In the opinion of defendant it is immaterial whether the rock came from one part of the raise or another, or from the roof of the intermediate drift, or elsewhere. The plaintiff was assuming only the ordinary risks which were incident to his employment and which he foresaw, or might have foreseen by the exercise of reasonable circumspection. No one is more ready than defendant to admit the obligation of a master to provide a reasonably safe place within which the servant is to render his service; but defendant most urgently maintains that this rule should be reasonably applied, and that it does not apply to the case at bar, where the plaintiff, working within the scope of his employment is engaged in assisting to make the place of service safe.

All of which is respectfully submitted.

SHACKLEFORD & BAYLESS,
Z. R. CHENEY,
Attorneys for Defendant in Error.

RUFUS THAYER,
Of Counsel.